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No. 92-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF VERNON,

Petitioner,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO FILE AMICI BRIEF AND JOINT BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF CITY OF VERNON'S PETITION FOR WRIT OF CERTIORARI

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JOINT MOTION OF AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF THE CITY OF VERNON

The American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") jointly move pursuant to Rule 37 of the Revised Rules of the Supreme Court of the United States for permission to file the attached amici brief in support of the petition for a writ of certiorari filed by the City of Vernon on July 20, 1992. This motion is necessary because Southern Cal-

ifornia Edison Company has refused to consent to the filing of the joint amici brief. City of Vernon has consented to filing of the joint amici brief. In support of their joint motion, APPA and NRECA show the following:

1. APPA is the national service organization representing more than 1,750 locally controlled public power systems throughout the United States. Collectively these systems constitute 15 percent of the electric utility industry in terms of customers served, providing electric service to more than 35 million customers. Some public power systems are vertically integrated utilities, owning generation, transmission and distribution facilities. Many more, however, own no transmission and are dependent on other utilities to provide transmission services. Such utilities are frequently referred to as transmission dependent utilities ("TDUs"). In most cases, the transmission facilities are owned by an investor owned utility ("IOU"). Further, that IOU is quite likely to be the public power system's electricity supplier as well as its direct retail competitor.

2. NRECA is the national organization of approximately 1,000 rural electric systems in 46 states, most of which are cooperatives. NRECA's members include local distribution cooperatives, which sell electric power to retail consumer-owners who are members of the cooperative, and generation and transmission cooperatives ("G&Ts") formed by distribution cooperatives to meet their power supply needs.

NRECA members provide central station service to some 25 million consumers-owners in more than 2,600 of the nation's 3,141 counties. Of these rural electric

systems, 62 are G&Ts, which are owned by, and serve 771 of the more than 900 rural electric distribution systems. G&Ts provide bulk power through generation and wholesale power purchases to their member-owner distribution cooperatives.

Generally, most distribution cooperatives are TDUs, in that they rely on the bulk power system of their wholesale supplier(s) for energy supply. Most are members of G&Ts, and many G&Ts also rely on other utilities' transmission for access to generation and purchased power.

3. The decision of the Ninth Circuit in *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361 (1992), greatly restricts the usefulness of the antitrust laws as a vehicle for obtaining access to the transmission facilities which are bottlenecks between the APPA and NRECA members and competing wholesale power suppliers. Without such access, the members have little resource other than to purchase their electricity requirements from their competitor that controls transmission access.

4. This Court stated in *Otter Tail v. United States*, 410 U.S. 366, 375 (1973), that Congress has not authorized the Federal Energy Regulatory Commission to compel a transmission dominant utility to provide transmission service. Rather, in large measure, Congress left provision of transmission service to the voluntary business judgment of the utilities. Such business judgment is subject to the requirements of the antitrust laws. The APPA and NRECA are gravely concerned with any decisions which weaken the ability of their members to rely upon the antitrust laws to pry open markets to competition.

5. The Ninth Circuit's decision is of concern not only to the many APPA and NRECA members located in the Ninth Circuit but also to their nationwide membership which will be affected if other courts follow the Ninth Circuit's lead in limiting this Court's *Otter Tail* decision. The problems presented by the Ninth Circuit's decision to the continuing efforts to achieve a more efficient industry through increased competition are nationwide in scope. APPA and NRECA are uniquely situated to address these important issues from a nationwide perspective of transmission dependent utilities.

WHEREFORE, APPA and NRECA request permission to file the attached amici brief in support of the petition for a writ of certiorari of the City of Vernon.

Respectfully submitted,

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JOINT BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF CITY OF VERNON'S PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") jointly submit this amici curiae brief in support of the petition for a writ of certiorari of the City of Vernon, California ("Vernon"), to the United States Court of Appeals for the Ninth Circuit with respect to its opinion in *City of Vernon v. South-*

ern California Edison Company, 955 F.2d 1361 (1992) (Appendix at 1).[1]

STATEMENT OF INTEREST

APPA is the national service organization representing more than 1,750 locally controlled public power systems throughout the United States. Collectively these systems constitute 15 percent of the electric utility industry in terms of customers served, providing electric service to more than 35 million customers. Some public power systems are vertically integrated utilities, owning generation, transmission and distribution facilities. Many more, however, own no transmission and are dependent on other utilities to provide transmission services. Such utilities are frequently referred to as transmission dependent utilities ("TDUs"). In most cases, the transmission facilities are owned by an investor owned utility ("IOU"). Further, that IOU is quite likely to be the public power system's electricity supplier as well as its direct retail competitor.

NRECA is the national organization of approximately 1,000 rural electric systems in 46 states, most of which are cooperatives. NRECA's members include local distribution cooperatives, which sell electric power to retail consumer-owners who are members of the cooperative, and generation and transmission cooperatives ("G&Ts") formed by distribution cooperatives to meet their power supply needs.

NRECA members provide central station service to some 25 million consumers-owners in more than 2,600

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[1] "Appendix" or "App." refers to the Appendix to the Petition for Writ of Certiorari of Vernon.

of the nation's 3,141 counties. Of these rural electric systems, 62 are G&Ts, which are owned by, and serve 771 of the more than 900 rural electric distribution systems. G&Ts provide bulk power through generation and wholesale power purchases to their member-owner distribution cooperatives.

Generally, most distribution cooperatives are TDUs, in that they rely on the bulk power system of their wholesale supplier(s) for energy supply. Most are members of G&Ts, and many G&Ts also rely on other utilities' transmission for access to generation and purchased power.

In order to be competitive in the retail market, TDUs generally must have transmission access to reach alternative bulk power suppliers in a competitive generation market.[2] The Federal Energy Regulatory Commission ("FERC") has recognized the importance of retail competition in the context of expressing concern that monopoly power at the wholesale level not be used to enhance or maintain an integrated utility's retail market position. The FERC has found that increased competition for franchises to provide retail electric service can be a positive force to encourage better service at lower rates. Increasing the cost of wholesale electricity to existing distribution systems (such as by denying them the access to lower cost wholesale competitors) dissuades

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[2] Regulation of Electricity for Resale and Transmission Service, FERC Docket No. RM85-17 (Phase I, NOI, May 30, 1985), FERC Stat. and Reg. ¶ 35,518 ("the availability of transmission service is a necessary element of competitive electricity markets").

others from entering the market as distribution systems.[3]

The decision of the Ninth Circuit is antithetical to an emerging competitive wholesale bulk power market and growing recognition of the importance of transmission access for that market to fully develop. The National Energy Strategy Report stresses the importance of transmission access "to increase economic efficiency" and "competition in wholesale markets" to "ensure that the Nation's industries, shops, and residences have access to electricity at the lowest reasonable cost."[4] The 1991 Economic Report of the President and the Annual Report of the Council of Economic Advisers states that "[s]teps should be taken to ensure that access to high-voltage transmission network is not controlled in a manner that restricts competition."[5] The United States Department of Energy concluded that greater access to transmission facilities would increase competition in wholesale markets and help ensure that the Nation's retail customers receive reliable electricity at the lowest reasonable cost.[6] The Office of Technology Assessment also supports expanded transmission access to increase competition.[7]

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[3] *Florida Power & Light*, 8 FERC ¶ 61,121 (1979), rehrg. denied, 9 FERC ¶ 61,015 (1979).

[4] National Energy Strategy, First Edition, 1991/1992 at 35.

[5] 1991 Economic Report of the President at 107.

[6] United States Department of Energy, April 1991, Response to Questions of Congressman Edward Markey.

[7] Electric Power Wheeling and Dealing: Technological Considerations for Increasing Competition, OTA Report, 1989, at 6.

TDUs have, in the past, relied upon this Court's decision applying the Sherman Act in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and other precedents to force monopolistic integrated electric utilities controlling essential transmission facilities to provide the transmission access necessary to reach competing wholesale suppliers. The threat of such antitrust lawsuits has had a slow but salutary effect in expanding transmission access and increasing competition.[8]

The decision of the Ninth Circuit in *City of Vernon v. Southern California Edison Co.*, dramatically undercuts *Otter Tail* and other decisions of this Court and other decisions of Circuit Courts of Appeal, by providing a ready defense to any attempt by a TDU to obtain transmission access. It does so at the very time the national interest requires that the electric utility industry have available all appropriate generating options so that the most efficient mix of plants for satisfying the demand for electricity at reasonable costs can be built.[9] As the FERC report indicates, for the wholesale electricity market to be competitive and robust, all utilities, including TDUs, must be able to obtain long-term firm transmission service.[10] Without access to the essential transmission facilities, TDUs will be excluded from the competitive wholesale power markets. While municipal and cooperative utilities are potentially constructive forces for both the supply and demand sides of the bulk (wholesale) power

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[8] FERC 1989 Transmission Task Force Report at 175.

[9] Id. at 165.

[10] Id. at 171.

market,[11] they cannot perform this role if their current monopoly suppliers can exclude them from the market with impunity.

Since the FERC has little meaningful power to compel IOUs to provide transmission service,[12] the only recourse available to TDUs to force their monopoly supplier to allow competition in the wholesale market, is enforcement of the antitrust laws. Accordingly, the members of APPA and NRECA will be seriously and adversely impacted by the Ninth Circuit's decision at issue herein.

SUMMARY OF ARGUMENT

A vertically integrated electric utility is legally precluded from using its monopoly power over essential transmission resources to preserve its monopoly in the wholesale and retail electricity markets. Although a monopolist in many instances does not have a duty to deal with a competitor, a monopolist may not refuse to deal if the refusal is for the purpose of maintaining a monopoly or if the monopolist controls an essential facility like transmission lines.[13] Since Edison has conceded (Pet. at 3) that it has monopoly power in relevant markets, that its transmission lines are essential facilities, and that it competes with Vernon, Edison has a duty to deal under both prongs of the rule.

If a monopolist refuses to deal in the face of an antitrust duty to deal, it has a "heavy burden of

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[11] Id.

[12] *Otter Tail, supra*, 410 U.S. at 375.

[13] Von Kalinowski, *Antitrust Laws and Trade Regulation* §36C.02[3] (Matthew Bender).

establishing an affirmative defense which competitively justifies [its] apparent deviation from the operations of a free market." *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 113 (1984). To meet that burden, a monopolist must show that the procompetitive effects of its refusal to deal outweigh the anticompetitive effects. *Eastman Kodak Co. v. Image Technical Serv., Inc.*, ___ U.S. ___, 60 USLW 4465, 4475 (1992). Edison has failed to assert any efficiency justification for its refusal to deal. Even if it were assumed that the avoidance of a *de minimis* temporary price increase is procompetitive, the Ninth Circuit erred in failing to weigh it against the long-term anticompetitive effects.

The Ninth Circuit failed to apply *Otter Tail* by requiring both a refusal to provide transmission service and a refusal to sell wholesale power before *Otter Tail* is applicable. The affirmative defense permitted by the Ninth Circuit puts its decision at odds with the decisions of most other Circuits, thus creating an inconsistent application of the law among Circuits.

Throughout its decision, the Ninth Circuit ignored the national policy favoring the maximum possible competition in the industry. Rather, the Ninth Circuit has ruled that national policy must give way to the monopolist's desire to preserve its monopoly.

ARGUMENT

THE NINTH CIRCUIT'S HOLDING THAT A MONOPOLIST CAN EXCLUDE ITS COMPETITOR FROM THE INPUT MARKET BECAUSE THE MONOPOLIST BELIEVES THAT INCREASED COMPETITION WILL HARM ITS CUSTOMERS IS CONTRARY TO THE OPINIONS OF THIS COURT, TO THE OPINIONS OF OTHER CIRCUITS, AND TO THE NATIONAL POLICY IN FAVOR OF COMPETITION

A. The Ninth Circuit's Decision Conflicts With Decisions Of This Court.

The decision of the Ninth Circuit permits a vertically integrated electric utility with monopoly power in relevant markets to refuse to transmit power for a competitor because the monopolist in effect claimed that providing transmission service would have a temporary *de minimis* effect on the rates it charges its retail customers. In short, the Ninth Circuit's opinion permits the monopolist to restrain competition because, in the monopolist's opinion, competition does not work in the electric utility industry. This Court has long rejected defenses based on the argument that competition is not workable in a particular industry.[14] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689 (1978) ("The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to congress . . .". (citations omitted)). This Court has specifically rejected the no-

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[14] Von Kalinowski, *Antitrust Laws and Trade Regulation* §9.03[3] (Matthew Bender).

tion that the antitrust laws do not apply to electric utilities. *Otter Tail, supra,* 410 U.S. at 365.

The decision below is additionally based on the finding that the defendant, Southern California Edison Company ("Edison") was fully using its transmission lines and would have to cease its own use to provide transmission service to the plaintiff, City of Vernon.[15] As Vernon states (Pet. at 3, n. 2), the only record evidence that Edison was fully utilizing its lines was the statement of one Edison employee that Edison's lines were always fully utilized even if they were carrying no power unless the lines were out of service and disconnected. Thus, Edison's full use did not mean the lines were fully loaded.

Edison's unique definition of full utilization, which was accepted by the Ninth Circuit, would permit any utility to deny access to its transmission lines because they were fully utilized, *i.e.*, the lines were not disconnected.[16] For example, the transmission lines at issue in *Otter Tail* were connected and in service; therefore, according to the Ninth Circuit, fully utilized regardless of the fact that the lines were not fully loaded. Under the Ninth Circuit's reasoning, *Otter Tail* would have been decided the other way.

The decision of the Ninth Circuit is one of two recent decisions which reveal that some Circuit Courts no longer feel constrained to follow *Otter Tail.* In

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[15] App. at 10.

[16] Prior decisions by this Court and the Ninth Circuit have held that transmission lines are not fully utilized unless they are fully loaded. *FPC v. Idaho Power Co.*, 344 U.S. 17 (1962); *Idaho Power Co. v. Federal Power Commission*, 346 F.2d 956 (9th Cir. 1965), cert. denied, 382 U.S. 957 (1965).

City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir. 1992), *cert. petition pending*, No. 91-2066, Oct. Term, 1991, the Tenth Circuit held that a monopolist in control of an essential gas pipeline can lawfully deny access to the pipeline to preserve its own profits. Moreover, the court held that so long as the pipeline was ready and willing to sell its own natural gas to the municipal distributors, there was no denial of access. Thus, the Tenth Circuit held that there was no violation of the antitrust laws despite the restraint of wholesale competition because the municipal distributors could always buy from the monopolist pipeline.

The Ninth Circuit also misreads *Otter Tail* to apparently determine that that precedent is not applicable unless there is a refusal to sell wholesale power as well as a refusal to provide transmission service.[17] However, in *Otter Tail*, this Court affirmed a district court decree which required Otter Tail to both sell at wholesale and to provide transmission service.[18] If selling wholesale power discharges the duty to deal as the Ninth and Tenth Circuits believe, there would have been no reason to require Otter Tail Power Company to also offer transmission service.

Development of a coherent national transmission and competition policy for the electric utility industry will be impeded, if not made impossible, if *Otter Tail* is only good law in the east and midwest but is of no effect in the western third of the nation, as a result of a conflict among the Circuits.

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[17] App. at 11.

[18] 410 U.S. at 368-69.

B. The Circuits Are Split In Enforcing A Monopolist's Duty To Deal.

As described above, if allowed to stand by this Court, the Ninth Circuit's decision would have the effect of gutting *Otter Tail*, at least in that Circuit. At the same time, other Circuits appropriately recognize a monopolist's duty to deal, especially when an essential facility is controlled by the monopolist.[19] The Second Circuit's decision in *Delaware & Hudson Ry Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 114 L.Ed.2d 125 (1991), properly applied the essential facility doctrine in holding that an unreasonable restriction of access need not be a total restriction—it is sufficient if the terms of the offer to deal are unreasonable. Further, the monopolist's refusal to deal could not be legally justified on the asserted ground that the conduct provided the monopolist with short term profits.

Certiorari should be granted to resolve the growing split of authority among the Circuits regarding the duty of a monopolist in control of an essential facility to deal with its competitors.

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[19] *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); *MCI Communications v. American T&T Co.*, 708 F.2d 1081 (7th Cir. 1983); *Gamco Inc. v. Providence Fruit & Produce Bld., Inc.*, 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); *Byars v. Bluff City News*, 609 F.2d 843 (6th Cir. 1980); *TV Signal Co. v. AT&T*, 617 F.2d 1302 (8th Cir. 1980); *Woods Exploration & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

C. The Ninth Circuit Has Recognized A New Business Justification Defense That Is Inconsistent With This Court's Decisions.

The Ninth Circuit held that Edison had a legitimate business justification defense to a section 2 claim for denial of access to an essential facility. Edison's defense was based upon a number of assumptions: *if* Edison granted Vernon transmission access to competing wholesale suppliers, and *if* Edison did not respond to competition by operating more efficiently, and *if* as a result of competition to purchase wholesale power Edison's costs increased,[20] and *if* Vernon's purchases of power from others reduced Vernon's subsidy of Edison retail service, and *if* Edison filed and was allowed to collect increased retail rates, its retail customers would face a *de minimis* temporary increase in rates. Edison failed to show that any of these speculative assumptions were satisfied. Edison did not argue that it was able to operate with greater efficiency if it refused to deal with Vernon. The foreclosure of competition to maintain monopoly power is a violation of section 2 of the Sherman Act. *Eastman Kodak Co. v. Image Technical Service, Inc.*, ___ U.S. ___, 60 USLW 4465 (1992). Liability in such

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[20] The California Public Utilities Commission has found after full hearing that Edison's control over transmission permits it to exercise monopsony power to depress prices in the wholesale bulk power market. *In the Matter of the Application of SCEcorp and its public utility subsidiary Southern California Edison Company and San Diego Gas & Electric Company for Authority to Merge San Diego Gas & Electric Company into Southern California Edison Company*, 122 PUR4th 225, 266, 314 (finding of fact no. 180) (1991). To the extent granting transmission access reduced Edison's monopsony power, prices in a competitive wholesale/bulk power market might increase.

cases depends upon whether there is a valid business reason for the foreclosure. Valid business reasons exist only if there are legitimate competitive reasons for the refusal. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), cited at note 32 in *Eastman Kodak Co., supra.* Edison failed to offer any procompetitive justification for its refusal to deal. Despite the lack of any efficiency or procompetitive reason for the refusal to deal the Ninth Circuit held that Edison had a valid business justification based on the claimed adverse effect on its customers.[21]

Edison's position was that in order to avoid a temporary *de minimis* rate increase to its retail customers, it had to be allowed to wield its transmission monopoly to maintain its wholesale and retail monopolies. The Ninth Circuit agreed. Contrary to the Ninth Circuit, the use of monopoly power in one market to maintain monopoly power in another market is an antitrust violation. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). The rule of *Lorain Journal* and *Southern Photo* is not abrogated because the monopolist might avoid a temporary *de minimis* price increase by maintaining its monopoly.

It has long been the law that it is no defense to an antitrust violation that the violation may temporarily or even permanently reduce prices. *Fashion Originators' Guild of America v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457, 467 (1941); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Accordingly, the avoidance of a temporary, *de minimis* price increase is not a defense. In

[21] App. at 10.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), this Court rejected the argument that a municipality should be exempt from the antitrust laws because it was motivated by the well-being of its citizen-customers rather than private profit. *A fortiori*, a private corporation, like Edison, should not be able to defend an antitrust violation by arguing that it is motivated by the well-being of its customers in protecting them from the harmful side effects of competition.[22] This is particularly the case where the effects are short-term and *de minimis*.

D. National Policy Favors More, Not Less, Competition in the Electric Utility Industry.

Vernon, in its petition for certiorari, has demonstrated that Congress has expressed national public policy in fostering the maximum attainable competition in the electric utility industry.[23] Scholarly literature has confirmed the benefits of competition in the

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[22] Vernon submitted evidence that Edison's claimed concern for its retail ratepayers was pretextual. See Pet. at 9-10 and note 26.

[23] Pet. at 23-25.

industry[24] as has the FERC.[25] Access to transmission service is essential to effective competition in the electricity markets.[26] It is notable that one third of all power sold at retail was previously sold at wholesale rather than self-generated.[27] In the future, the nation will have to rely upon non-traditional power suppliers to meet the need for additional generating resources.[28] In fact, in 1990 independent generators of electric energy built more new generation capacity than traditional electric utilities.[29] The lack of transmission access can be a barrier to entry into the competitive generation market and non-traditional generators will require transmission access to com-

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[24] Weiss, "Antitrust and the Electric Power Industry", 135, 170-171, in Promoting Competition in Regulated Markets (Almarin Philips ed., 1975); Meeks, "Concentration in the Electric Power Industry; The Impact of Antitrust Policy," 72 Colum. L. Rev., 64, 120, 125 (1972); R. Hellman, Government Competition in the Electric Utility Industry, A Theoretical and Empirical Study 228 (1972); W. Shepard & C. Wilcox, Public Policies Towards Business 415 (6th ed. 1979) (effective competition in bulk power market is technologically feasible and would produce significantly lower costs and better service); 2 A.E. Kahn, The Economics of Regulation: Principles and Institutions 104-06 (1970) (significant value of retail competition in electric utility markets).

[25] *Gulf States Utilities Co.*, 5 FERC ¶61,066 at 61,098 (1978).

[26] Regulation of Electricity for Resale and Transmission Service, FERC Docket No. RM85-17 (Phase I, NOI, May 30, 1985); Pierce, "A Proposal to Deregulate the Market for Bulk Power", 72 Va. L. Rev. 1183, 1215 (1986).

[27] FERC 1989 Transmission Task Force at 18.

[28] Id. at 67.

[29] 1990 Utility Data Institute.

pete for wholesale sales.[30] Non-traditional generators of electric energy that have won bids to provide power have been blocked from supplying that power due to a utilities' refusal to wheel power.[31] The President, the Department of Energy, FERC, the Council of Economic Advisers and Congress' Office of Technology Assessment, to name just a few, recognize the need for transmission access in order to elicit long term general efficiencies. See notes 4 to 7, *supra*. Both the industry and regulators have been studying methods of increasing transmission access, in order to elicit long term generation efficiencies.[32] At the very time that national policy makers and bodies are stressing the importance of increasing transmission access the Ninth Circuit has recognized a justification which readily permits integrated monopolists to deny necessary transmission access to their transmission dependent competitors.

Certiorari should be granted to ensure that the national policy in favor of competition is not thwarted to preserve a possible temporary, *de minimis* advantage to the monopolist's retail customers.

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[30] Id.

[31] Testimony of Larry W. Ellis, Virginia Electric & Power Company, before the State Corporation Commission of Virginia, Case No. PUE 8905 (1989).

[32] National Governor's Association 1987 report *Moving Power: Flexibility For the Future*; National Regulatory Research Institute 1987 reports: *Some Economic Principles for Pricing Wheeling Power*, and *Non-technical Impediments to Power Transfers*; the Office of Technology Assessment of the United States Congress *Electric Power Wheeling and Dealing: Technology Considerations for Increasing Competition* (May 1989).

CONCLUSION

The Ninth Circuit has misapplied *Otter Tail* and created new justifications for refusal to deal which permit a monopolist to use its power in one market to maintain its monopoly in another market. At a time when it is widely recognized that the assurance of an adequate and efficient electric utility industry requires greater competition, the Ninth Circuit's decision gives transmission dominant utilities the green light to foreclose the development of competition.

The requested writ of *certiorari* should be issued to provide the Court with the opportunity to restore the vigor of the antitrust laws and to enforce the national policy in favor of competition.

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